

EXHIBIT A

KMZRosenman
KATTEN MUCHIN ZAVIS ROSENMAN

Direct Billing Inquiries to:
Janice Thomas
212-872-5346
FEIN: 36-2796532

575 Madison Avenue
New York, NY 10022-2585

March 31, 2003

Practiceworks, Inc.
Attn: Dennis J Stockwell, Esq.
General Counsel
1765 The Exchange
Atlanta, GA 30339

Invoice No. 1300006845
Client No. 101050

Re: Professional Software Solutions, NE KMZR Matter No. (00003)

For legal services rendered through February 28, 2003.....	\$65,337.00
Disbursements	<u>\$1,776.91</u>

CURRENT INVOICE CHARGES: \$67,113.91

PRIOR UNPAID BALANCE (See Remittance Page for Detail): \$91,559.70

TOTAL BALANCE DUE: \$158,673.61

Disbursements and other charges incurred which have not yet been posted
as of the above date will be billed at a later date.

A Law Partnership including Professional Corporations

Practiceworks, Inc.
Professional Software Solutions, NE
Invoice No. 1300006845

PROFESSIONAL SERVICES

Date	Attorney or Assistant	Description	Hours	Amount
02/02/03	Gordon, Michael S.		3.70	1,535.50
02/03/03	Gordon, Michael S.		5.10	2,116.50
REDACTED				
02/03/03	Cahen, Geoffrey M.		8.20	1,558.00
02/04/03	Cotton, Howard E.		4.00	2,200.00
02/04/03	Folb, Kerri		5.00	1,425.00
02/04/03	Gordon, Michael S.		6.50	2,697.50
REDACTED				
02/04/03	Cahen, Geoffrey M.		2.30	437.00
02/05/03	Cotton, Howard E.		3.80	2,090.00

Practiceworks, Inc.
Professional Software Solutions, NE
Invoice No. 1300006845

PROFESSIONAL SERVICES

Date	Attorney or Assistant	Description	Hours	Amount
02/05/03	Folb, Kerri		4.00	1,140.00
02/05/03	Gordon, Michael S.		6.50	2,697.50
02/06/03	Cotton, Howard E.		3.90	2,145.00
02/06/03	Folb, Kerri		2.00	570.00
02/06/03	Gordon, Michael S.		7.20	2,988.00
02/07/03	Cotton, Howard E.		4.70	2,585.00
02/07/03	Gordon, Michael S.		7.00	2,905.00
02/10/03	Cotton, Howard E.		3.70	2,035.00
02/10/03	Gordon, Michael S.		5.20	2,158.00

Practiceworks, Inc.

Professional Software Solutions, NE

Invoice No. 1300006845

PROFESSIONAL SERVICES

Date	Attorney or Assistant	Description	Hours	Amount
02/10/03	Tiffany, Michael J.		0.00	N/C
02/11/03	Cotton, Howard E.		0.70	385.00
02/11/03	Gordon, Michael S.		3.50	1,452.50
02/12/03	Cotton, Howard E.		0.70	385.00
02/12/03	Gordon, Michael S.		3.30	1,369.50
02/13/03	Cotton, Howard E.		2.10	1,155.00
02/13/03	Gordon, Michael S.		3.50	1,452.50
02/14/03	Gordon, Michael S.		3.70	1,535.50
02/18/03	Cotton, Howard E.		1.40	770.00
02/18/03	Gordon, Michael S.		2.30	954.50
02/19/03	Cotton, Howard E.		2.40	1,320.00
02/19/03	Folb, Kerri		4.00	1,140.00
02/19/03	Gordon, Michael S.		3.80	1,577.00

Practiceworks, Inc.
Professional Software Solutions, NE
Invoice No. 1300006845

PROFESSIONAL SERVICES

Date	Attorney or Assistant	Description	Hours	Amount
02/20/03	Cotton, Howard E.		3.90	2,145.00
02/20/03	Folb, Kerri		5.30	1,510.50
02/20/03	Gordon, Michael S.		4.50	1,867.50
02/21/03	Cotton, Howard E.		5.10	2,805.00
02/21/03	Gordon, Michael S.		5.00	2,075.00
02/24/03	Cotton, Howard E.		2.00	1,100.00
02/24/03	Gordon, Michael S.		3.00	1,245.00
02/25/03	Gordon, Michael S.		1.90	788.50
02/26/03	Cotton, Howard E.		1.60	880.00
02/26/03	Gordon, Michael S.		2.70	1,120.50
02/27/03	Cotton, Howard E.		1.40	770.00
02/27/03	Gordon, Michael S.		1.50	622.50
02/28/03	Cotton, Howard E.		1.30	715.00
02/28/03	Gordon, Michael S.		2.20	913.00

Practiceworks, Inc.

Professional Software Solutions, NE

Invoice No. 1300006845

PROFESSIONAL SERVICES

Date	Attorney or Assistant	Description	Hours	Amount
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REDACTED

Totals:			155.60	\$65,337.00
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SUMMARY OF PROFESSIONAL SERVICES

	Attorney or Assistant	Hours	Rate	Amount
20004	Cahen, Geoffrey M.	10.50	190.00	\$1,995.00
03215	Cotton, Howard E.	42.70	550.00	\$23,485.00
04015	Folb, Kerri	20.30	285.00	\$5,785.50
04359	Gordon, Michael S.	82.10	415.00	\$34,071.50
Current Fees for Matter 00003:		155.60		\$65,337.00

Practiceworks, Inc.

Professional Software Solutions, NE

Invoice No. 1300006845

DISBURSEMENTS

Date	Description	Amount
01/13/03	PAYEE: Cash; REQUEST#: 271410; DATE: 2/4/2003.	7.00
	Cab.	
01/14/03	PAYEE: Cash; REQUEST#: 271410; DATE: 2/4/2003. Cab 1/14.	7.00
01/15/03	VENDOR: The Great American Health Bar Corp.; INVOICE#: 368126; DATE: 1/15/2003 K. Kolb ordered 1/15/03	12.20
01/20/03	VENDOR: Federal Express Corp.; INVOICE#: 4-529-52711; DATE: 1/20/2003 From: Joanne Baker KMZ Rosenman NY TO: Dennis Stockwell Atlanta GA 01/10/03	11.31
01/27/03	VENDOR: The Great American Health Bar Corp.; INVOICE#: 368403; DATE: 1/27/2003 K. Folb ordered 1/27/03	11.70
01/27/03	VENDOR: Federal Express Corp.; INVOICE#: 4-529-92858; DATE: 1/27/2003 From: J. Baker TO: Mark Wiemelt Chicago IL 01/17/03	11.31
01/27/03	VENDOR: Federal Express Corp.; INVOICE#: 4-529-92858; DATE: 1/27/2003 From: J. Baker To Felicia Cannon Clerk Baltimore MD 01/17/03	9.66
01/27/03	VENDOR: Federal Express Corp.; INVOICE#: 4-529-92858; DATE: 1/27/2003 From: J Baker TO: J. Murphy Baltimore MD 01/17/03	9.66
02/03/03	Photocopies	2.00
02/03/03	Legal Research: CAHEN, GEOFFREY	34.51
02/03/03	Legal Research: M. TIFFANY	44.00
02/03/03	Legal Research: G. CAHEN	93.50
02/04/03	Long Distance call to SMYRNA, GA, 6785898749 By BAKER JOANNE P.	0.30
02/04/03	Fax sent to 14109622698 from COTTON HOWARD E.	4.80
02/04/03	Fax sent to 13123726568 from COTTON HOWARD E.	4.80
02/04/03	Fax sent to 14105470699 from COTTON HOWARD E.	4.80
02/04/03	Fax sent to 17708505011 from COTTON HOWARD E.	19.20
02/04/03	Fax sent to 12128888133 from GORDON MICHAEL S	8.00
02/04/03	Fax sent to 14109622698 from GORDON MICHAEL S	9.60
02/04/03	Fax sent to 13123726568 from GORDON MICHAEL S	9.60
02/04/03	Fax sent to 14105470699 from GORDON MICHAEL S	9.60
02/04/03	Fax No: 14109622698	0.60
02/04/03	Fax No: 13123726568	0.60
02/04/03	Fax No: 14105470699	0.60
02/04/03	Fax No: 17708505011	3.59
02/04/03	Fax No: 14109622698	0.90
02/04/03	Fax No: 13123726568	0.90

Practiceworks, Inc.

Professional Software Solutions, NE

Invoice No. 1300006845

DISBURSEMENTS

Date	Description	Amount
02/04/03	Fax No: 14105470699	0.90
02/04/03	Photocopies	33.20
02/04/03	Legal Research: CAHEN, GEOFFREY	49.30
02/04/03	Legal Research: M. TAFFANY	22.00
02/04/03	Legal Research: G. CAHEN	38.50
02/04/03	Legal Research: K. FOLB	38.50
02/05/03	Long Distance call to BALTIMOR, MD, 4109620782 By BAKER JOANNE P.	0.60
02/05/03	Long Distance call to BALTIMOR, MD, 4109620782 By BAKER JOANNE P.	0.30
02/05/03	Long Distance call to ATLANTA, GA, 4048748300 By BAKER JOANNE P.	0.30
02/05/03	Fax sent to 14109622698 from GORDON MICHAEL S	9.60
02/05/03	Fax sent to 14048175459 from COTTON HOWARD E.	8.00
02/05/03	Fax sent to 16787429620 from COTTON HOWARD E.	8.00
02/05/03	Fax No: 16787429620	0.90
02/05/03	Fax No: 14109622698	0.90
02/05/03	Fax No: 14048175459	0.90
02/05/03	Photocopies	5.40
02/05/03	Legal Research: FOLB, KERRI	497.99
02/06/03	Legal Research: M. TIFFANY	16.50
02/07/03	Automated Document Preparation	17.50
02/07/03	Photocopies	8.00
02/07/03	Photocopies	11.60
02/07/03	Legal Research: TIFFANY, MICHAEL	19.72
02/07/03	Legal Research: M. TIFFANY	220.00
02/09/03	Fax sent to 12127129562 from GORDON MICHAEL S	72.00
02/10/03	Postage	3.95
02/10/03	Binding	8.00
02/10/03	Photocopies	135.00
02/10/03	Photocopies	28.20
02/11/03	Photocopies	0.60
02/11/03	Photocopies	1.00
02/13/03	Photocopies	20.40
02/14/03	Photocopies	1.60
02/19/03	Legal Research: FOLB, KERRI	118.40
02/20/03	Photocopies	0.20
02/20/03	Legal Research: FOLB, KERRI	23.08

Practiceworks, Inc.

Professional Software Solutions, NE

Invoice No. 1300006845

DISBURSEMENTS

Date	Description	Amount
02/21/03	Photocopies	5.00
02/24/03	Fax sent to 13123726568 from COTTON HOWARD	3.20
02/24/03	Fax No: 13123726568	0.60
02/24/03	Photocopies	5.00
02/24/03	Photocopies	1.20
02/27/03	FedEx DC; Inv.#: 4-552-62023; Date: 1/14/03; B. Corcoran to: Clerk of the Court/U.S. District Court-Maryland - Baltimore, MD 21201 delivered 1/7/03.	7.53
02/28/03	Photocopies	1.60

Current Disbursements for Matter 00003:

\$1,776.91

Please include this remittance advice with your payment to ensure proper account crediting

Attorney:	03215	Howard Cotton
Client:	101050	Practiceworks, Inc.
Matter:	00003	Professional Software Solutions, NE

Invoice No.:	1300006845	Invoice Date:	03/31/03
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Current Invoice Charges: \$67,113.91

PREVIOUS BALANCE DUE:

Inv Date	Invoice #	Invoice Amt	Previous Payments	Balance	Current Payment
02/28/03	1300000573	91,559.70	0.00	91,559.70	<u>91,559.70</u>

Total Now Due: \$158,673.61

TOTAL AMOUNT ENCLOSED:

Mailing Address:
Katten Muchin Zavis Rosenman
575 Madison Avenue
New York, NY 10022-2585

Wiring Instructions:

**JP Morgan Chase Bank
1211 Avenue of the Americas, 39th Floor
New York, New York 10036
Attn: Deanne Frederick
Phone: 212-789-6046
ABA #021000021
Swift Code: CHASUS33
Reference: 101050.00003
For Credit To: Katten Muchin Zavis Rosenman
Operating Account
Account #967343933**

When wiring a payment please fax a copy of the Remittance to Heidi Grossman at 212-872-5344

Please direct any billing inquiries to Janice Thomas 212-872-5346

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PRACTICEWORKS, INC., et al.,)	
)	Civil Action No.
Plaintiffs/Counter-Defendants,)	JFM 02 CV 1206
)	
v.)	
)	
DENTAL MEDICAL AUTOMATION, INC.,)	
)	
Defendant/Counter-Plaintiff.)	

**DEFENDANTS' AMENDED FIRST SET OF REQUESTS FOR DOCUMENTS
AND THINGS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Defendant and Counter-Plaintiff DENTAL MEDICAL AUTOMATION, INC. ("Plaintiff") requests that Plaintiffs and Counter-Defendants PRACTICEWORKS, INC. and SOFTDENT, LLC ("Defendants") produce the following documents and tangible things for inspection and copying in accordance with the definitions and instructions set forth below within thirty (30) days after service hereof:

DEFINITIONS AND INSTRUCTIONS

A. "Documents," as used herein, has the same full meaning as Rule 34(a) of the Federal Rules of Civil Procedure, and includes, without limitation, the originals of all writings of every kind, including but not limited to letters, e-mails, dockets, telegrams, speeches, calendars, diary entries, travel records, expense records, advertising, promotional materials, pamphlets, handwritten notes, drafts, lists, directives, orders, tabulations,

minutes and records of meetings, and telephone records, which are in the possession, custody or control of Plaintiff. The term "document" further includes data processing and computer printouts, tapes, disks, and retrieval listings, and data processing equipment, together with programs and program documentation necessary to utilize or retrieve such data or information, and all other mechanical or electronic means of storing or recording data or information, as well as tape, film, or cassette sound or visual recordings, and reproductions or film impressions of any of the aforementioned writings. The term "documents" also includes copies of documents which are not identical duplicates of the originals, and copies of documents if the originals of documents are not in the possession, custody or control of Plaintiff.

B. As used herein, "person" shall mean any individual, firm, partnership, corporation, proprietorship, association, governmental body, or any other organization or entity.

C. As used herein, "date" shall mean the exact day, month and year if ascertainable, or, if not, the best available approximation (including relationship to other events).

D. As used herein, "identify" when used in reference to:

- (a) an individual, means to state his or her full name, present or last known residential and business addresses and present or last known position and/or business affiliation;
- (b) a firm, partnership, corporation, proprietorship, joint venture, association, or other organization or entity, means to state its full name, present or last known address and place of incorporation or formation;
- (c) a document, means to state the date, title (if any), each author, each recipient, type of document (i.e., publication, letter, memorandum, book, telegram, chart, etc.) or some

other means of identifying it, and its present location or custodian;

- (d) a communication, means to state its date and place, the person(s) who participated in it or who were present during any part of it or who have knowledge about it and the substance of the communication; and
- (e) a product, means to state the product's description, manufacturer designation by the manufacturer thereof (e.g., style, model, proprietary name, established name, product classification number and/or catalog number), and brand name or trademark.

E. As used herein, "Practiceworks" shall mean plaintiff and counter-defendant Practiceworks, Inc., its predecessors, divisions, subsidiaries, affiliated or related companies, parents, agents, servants, employees, attorneys and all persons in active concert and participation with plaintiff and counter-defendant Practiceworks, Inc.

F. As used herein, "Softdent" shall mean plaintiff and counter-defendant Softdent, LLC, its predecessors, divisions, subsidiaries, affiliated or related companies, parents, agents, servants, employees, attorneys and all persons in active concert and participation with plaintiff and counter-defendant Softdent, LLC.

G. As used herein, "DMA" shall mean defendant and counter-plaintiff Dental Medical Automation, Inc., its agents, servants, employees, attorneys and all persons in active concert and participation with defendant and counter-plaintiff Dental Medical Automation, Inc.

H. As used herein, "and" and "or" shall be construed both conjunctively and disjunctively and the singular shall be deemed to also refer to the plural and vice versa.

I. As used herein, "communication" means any transmission of information by any means including, but not limited to, e-mail, telephone, letters, telegrams,

teletypes, telexes, telecopies, computer linkups, written memoranda and face-to-face communication.

J. With respect to any Interrogatory as to which an objection is made, state the specific grounds for the objection and respond to such Interrogatory to the extent to which there is not objection.

K. If either Plaintiff objects to any Interrogatory, or any subpart thereof, on the ground that the Interrogatory requests the disclosure of privileged attorney-client communications, work product or any other matter allegedly immune from discovery, state the date and general subject matter of the communication or work product, identify each person who was present at or participated in such communication or the preparation of such work product, and the basis for the claim or privilege or immunity.

L. As used herein, "software" means any software or products containing the "SoftDent Dental Management System", related products, or components thereof, including SoftDent's "Platinum," "Advantage," and "Subscription" products.

M. As used herein, "support" means any technical assistance, service, upgrades and electronic services pertaining to the software or products containing the "SoftDent Dental Management System", related products, or components thereof, including SoftDent's "Platinum," "Advantage," and "Subscription" products.

REQUESTS

1. All documents referred to in your Answers to Interrogatories.
2. All statements (as that term is used in Fed. R. Civ. P. 26(b)(3)) which were previously made by Plaintiffs and their predecessors, and any of their present or former directors, officers, or employees, concerning the action or its subject matter.

3. All documents (including, but not limited to, correspondence, notes, memoranda, and journal entries) which relate to, describe, summarize, or memorialize any communication between you and your predecessors, DMA, Chuck Dermott, Frank Jones, Jr., Jeff Lyon, or anyone known or believed by you to have been acting under the authority of DMA or your predecessors concerning DMA's Dealer/Resellers Agreement.

4. All documents and things evidencing the chain of title of how PracticeWorks and SoftDent acquired the rights to the Dealer/Resellers Agreement between PSS and DMA.

5. All documents and things evidencing, pertaining to, regarding, referring to or relating to the quota set forth in the Dealer/Resellers Agreement between PSS and DMA, acquired by Plaintiffs.

6. All documents and things referring to, relating to, or evidencing the decision to or actual reduction, augmentation, modification or termination of the territory or the Dealer/Resellers Agreement of any and all dealers, including, but not limited to DMA, from January 1, 1993 to the present.

7. All documents and things evidencing communications by Plaintiffs (or all predecessors in interest) and third parties doing business in DMA's territory regarding, relating to or referring to DMA or Plaintiffs' products or services, from January 1, 1993 to the present.

8. All documents and things evidencing any contract, agreement, or proposed contract or agreement, between Plaintiffs (or all predecessors in interest) and DMA.

9. All documents and things evidencing any contract, agreement, or proposed contract or agreement, between Plaintiffs (or all predecessors in interest) and dealers of the Software and associated products other than DMA.

10. All documents and things referring to, relating to, or evidencing the durational term of any contract/agreement between Plaintiffs and DMA and between Plaintiffs (or all predecessors in interest) and all other dealers besides DMA.

11. All documents and things concerning the negotiation, execution, performance, attempted renegotiation and attempted termination of the Agreement between Plaintiffs (or all predecessors in interest) and DMA dated January 1, 1993, and any Addendum thereto.

12. All documents and things concerning any litigation or controversies between Plaintiffs and other parties involving or relating to a Dealer/Resellers Agreement.

13. All documents and things regarding any allegation set forth by Plaintiffs in any and all pleadings in this matter.

14. All documents and things comprising of or concerning the advertising, communication of offer, or offer of SoftDent software and related products for direct sale from Plaintiffs (or all predecessors in interest) to any dentists, orthodontists, oral surgeons or practice groups comprising of the like located in the zip code ranges defined in the Agreement to comprise Defendant's "Exclusive Territory" since January 1, 1993.

15. All documents and things showing all sales made by DMA or others in DMA's Territory from January 1, 1993 to the present time for, including but not limited

to: 1) updates; 2) upgrades; 3) Soft Chart; 4) Electronic Claims submission and statements; and 5) customer support.

16. All documents and things concerning the distribution of SoftDent software upgrades, pricing, and participation in trade shows.

17. All documents and things concerning SoftDent products, related products, and services offered for sale or provided by Plaintiffs (or all predecessors in interest) or their dealers or distributors, since January 1, 1993.

18. All correspondence amongst individuals within Plaintiffs' (or all predecessors in interest) companies regarding the January 1, 1993 Agreement between Plaintiffs (or all predecessors in interest) and DMA; and all documents and things concerning any communications amongst individuals within Plaintiffs' companies Plaintiffs (or all predecessors in interest) regarding same.

19. All documents and things concerning Al Fiore's authority, whether real, implied, or apparent, to act on behalf of each of the Plaintiffs.

20. All documents and things concerning any agreements or proposed agreements between Plaintiffs (or all predecessors in interest) and Defendant, including, but not limited to, the Agreements, the proposed agreements, and any drafts thereof and correspondence concerning same.

21. All documents and things concerning Plaintiffs' activities at the 2002 Chicago Midwinter trade show.

22. All documents concerning Plaintiffs' and their predecessors' computer or e-mail archiving, back-up or storage programs or policies.

23. All documents concerning the financial condition of Plaintiffs.

24. A document entitled "Clarifications to Form 1995 PSS Dealer Agreement Term Sheet."

25. Copies of all documents and things referring or relating to compensation paid to any dealer upon termination, modification, sale or assignment of a Dealer/Resellers Agreement.

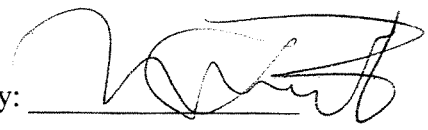
26. All documents and things passing between Plaintiffs and any person which Plaintiffs expect to call as a witness (including without limitation any expert witness) at any trial or hearing in this action.

27. All statements (as that term is used in Fed. R. Civ. P. 26(b)(3)) which were previously made by third parties concerning the action or its subject matter.

28. All documents and things not heretofore specifically requested that relate, in any way, to the subject matter of the peladings.

29. All documents and things that were reviewed, referred to, relied upon, consulted, or identified in connection with investigating and responding to Defendant's First Set of Interrogatories.

30. All documents and things that may or will be used at trial or any evidentiary hearing in this matter.

By: 

One of Plaintiff's Attorneys

Lead Counsel (Pro Hac Vice):
Mark E. Wiemelt (06208213)
LAW OFFICES OF MARK E. WIEMELT, P.C.
10 S. LaSalle St., Ste. 3500
Chicago, Illinois 60603
(312) 372-7664

Local Counsel:
John M.G. Murphy
Ober, Kaler, Grimes & Shriver
120 E. Baltimore Street
Baltimore, MD 21202-1643
(410) 347-7334

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of September, 2002, a copy of
the foregoing was mailed, First Class postage pre-paid to:

S. Scott Morrison, Esq.
Katten, Muchin, Zavis, Rosenman
1025 Thomas Jefferson Street, N.W.
East Lobby, Suite 700
Washington, DC 20007-5201

and to:

Howard E. Cotton, Esq.
Michael S. Gordon, Esq.
Katten, Muchin, Zavis, Rosenman
575 Madison Avenue
New York, NY 10022

Attorneys for Plaintiffs



Mark E. Wiemelt

EXHIBIT C

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

PRACTICEWORKS, INC., et al.,)	
)	Civil Action No.
Plaintiffs/Counter-Defendants,)	JFM 02 CV 1206
)	
v.)	
)	
DENTAL MEDICAL AUTOMATION, INC.,)	
)	
Defendant/Counter-Plaintiff.)	

DEFENDANT'S FIRST SET OF INTERROGATORIES TO PLAINTIFFS

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Defendant and Counter-Plaintiff DENTAL MEDICAL AUTOMATION, INC. ("Plaintiff") requests that Plaintiffs and Counter-Defendants PRACTICEWORKS, INC. and SOFTDENT, LLC ("Plaintiffs") answer the following interrogatories in accordance with the definitions and instructions set forth below within thirty (30) days after service hereof:

DEFINITIONS AND INSTRUCTIONS

A. "Documents," as used herein, has the same full meaning as Rule 34(a) of the Federal Rules of Civil Procedure, and includes, without limitation, the originals of all writings of every kind, including but not limited to letters, e-mails, dockets, telegrams, speeches, calendars, diary entries, travel records, expense records, advertising, promotional materials, pamphlets, handwritten notes, drafts, lists, directives, orders, tabulations, minutes and records of meetings, and telephone records, which are in the possession, custody or control of Plaintiff. The term "document" further includes data

processing and computer printouts, tapes, disks, and retrieval listings, and data processing equipment, together with programs and program documentation necessary to utilize or retrieve such data or information, and all other mechanical or electronic means of storing or recording data or information, as well as tape, film, or cassette sound or visual recordings, and reproductions or film impressions of any of the aforementioned writings. The term "documents" also includes copies of documents which are not identical duplicates of the originals, and copies of documents if the originals of documents are not in the possession, custody or control of Plaintiff.

B. As used herein, "person" shall mean any individual, firm, partnership, corporation, proprietorship, association, governmental body, or any other organization or entity.

C. As used herein, "date" shall mean the exact day, month and year if ascertainable, or, if not, the best available approximation (including relationship to other events).

D. As used herein, "identify" when used in reference to:

- (a) an individual, means to state his or her full name, present or last known residential and business addresses and present or last known position and/or business affiliation;
- (b) a firm, partnership, corporation, proprietor-ship, joint venture, association, or other organization or entity, means to state its full name, present or last known address and place of incorporation or formation;
- (c) a document, means to state the date, title (if any), each author, each recipient, type of document (i.e., publication, letter, memorandum, book, telegram, chart, etc.) or some other means of identifying it, and its present location or custodian;

- (d) a communication, means to state its date and place, the person(s) who participated in it or who were present during any part of it or who have knowledge about it and the substance of the communication; and
- (e) a product, means to state the product's description, manufacturer designation by the manufacturer thereof (e.g., style, model, proprietary name, established name, product classification number and/or catalog number), and brand name or trademark.

E. As used herein, "Practiceworks" shall mean plaintiff and counter-defendant Practiceworks, Inc., its predecessors, divisions, subsidiaries, affiliated or related companies, parents, agents, servants, employees, attorneys and all persons in active concert and participation with plaintiff and counter-defendant Practiceworks, Inc.

F. As used herein, "Softdent" shall mean plaintiff and counter-defendant Softdent, LLC, its predecessors, divisions, subsidiaries, affiliated or related companies, parents, agents, servants, employees, attorneys and all persons in active concert and participation with plaintiff and counter-defendant Softdent, LLC.

G. As used herein, "DMA" shall mean defendant and counter-plaintiff Dental Medical Automation, Inc., its agents, servants, employees, attorneys and all persons in active concert and participation with defendant and counter-plaintiff Dental Medical Automation, Inc.

H. As used herein, "and" and "or" shall be construed both conjunctively and disjunctively and the singular shall be deemed to also refer to the plural and vice versa.

I. As used herein, "communication" means any transmission of information by any means including, but not limited to, e-mail, telephone, letters, telegrams, teletypes, telexes, telecopies, computer linkups, written memoranda and face-to-face communication.

J. With respect to any Interrogatory as to which an objection is made, state the specific grounds for the objection and respond to such Interrogatory to the extent to which there is not objection.

K. If either Plaintiff objects to any Interrogatory, or any subpart thereof, on the ground that the Interrogatory requests the disclosure of privileged attorney-client communications, work product or any other matter allegedly immune from discovery, state the date and general subject matter of the communication or work product, identify each person who was present at or participated in such communication or the preparation of such work product, and the basis for the claim or privilege or immunity.

L. As used herein, "software" means any software or products containing the "SoftDent Dental Management System", related products, or components thereof, including SoftDent's "Platinum," "Advantage," and "Subscription" products.

M. As used herein, "support" means any technical assistance, service, updates, upgrades and electronic services pertaining to the software or products containing the "SoftDent Dental Management System", related products, or components thereof, including SoftDent's "Platinum," "Advantage," and "Subscription" products.

INTERROGATORIES

1. Identify any and all individuals having knowledge of the negotiation, execution, performance, attempted renegotiation, and/or attempted termination of the Agreement between Plaintiffs and Defendant dated January 1, 1993, and each Addendum thereto; and identify all documents related thereto.

2. State the full factual and legal basis for each of Plaintiffs' alleged affirmative defenses to Defendant's counterclaims, and identify all documents related thereto and all persons with knowledge thereof.

3. For DMA, provide the following:

- a) total sales in the Territory from January 1, 1993, by year to the present;
- b) a breakdown of sales by product, including but not limited to i) updates; ii) upgrades; iii) soft chart; iv) electronic claims submission and statements; and v) customer support; and
- c) how sales and quota were calculated for DMA from January 1, 1993, to the present.

For each subparagraph above, list any and all witnesses and documents that support your contention.

4. Identify and describe all litigation or controversies, including arbitration, mediation, and/or settlement, between Plaintiffs and distributors, resellers, dealers or licensees of Plaintiffs' products or services by stating the names of the parties, the jurisdiction, the proceeding number, the outcome of the proceeding or current status of the matter, and the citation of the decision if applicable; and identify all documents referring or relating thereto and all persons with knowledge thereof.

5. Identify and describe any and all statements, written and/or oral, regarding any allegation set forth by Plaintiffs in their Complaint, as well as any reply to Defendant's Answers as set forth in Plaintiffs' Reply to Defendant's Counterclaims; and identify all persons with knowledge thereof.

6. Identify each person involved in the decision not to renew and to attempt to terminate DMA's SoftDent dealership; and identify all documents referring or relating thereto.

7. Identify any documents regarding the acquisition of PracticeWorks from mid-1997 through March 2001 of dental management software providers; and identify all persons with knowledge thereof.

8. Identify each and every dealer by name and address that had a contract with PracticeWorks to market and support the SoftDent Dental Office Practice Management Software Program that was acquired by and assigned to Practiceworks, Inc. and SoftDent, LLC, from January 1, 1993 to the present. For each dealer: identify each and every dealer that has had its agreement (contract) terminated by you for i) non-renewal; ii) failure to meet sales quota; or iii) any reason since March 2001 by giving the name and address of each such dealer, the basis for termination for each such dealer, including all circumstances for the termination, and whether any compensation was paid to any terminated dealer after termination for any reason; and list all witnesses and documents referring or relating thereto.

9. Identify all people with knowledge and/or understanding of the intended duration of the Agreement between Plaintiffs and Defendant; and identify all documents referring or relating thereto.

10. Identify the factual and legal basis for Plaintiffs' allegation that the nine-month Disposition Period provided for in the letter of April 8, 2002 constitutes reasonable notice, and as such, an effective notice of termination or non-renewal of the

Agreement; and identify all documents related thereto and all persons with knowledge thereof.

11. Identify each customer or prospective customer, including any dentists, orthodontists, oral surgeons or practice groups comprising of the like located in the zip code ranges defined in the Agreement to comprise Defendant's "Exclusive Territory," who has referred to, inquired about, and/or mentioned Jeff Suglio, SoftDent software and/or related products and/or DMA, since April 8, 2002, and describe the date and substance of each such reference; and identify all documents referring or relating thereto and all persons with knowledge thereof.

12. Identify each customer or prospective customer, including any dentists, orthodontists, oral surgeons or practice groups comprising of the like located in the zip codes defined in the Agreement to comprise Defendant's "Exclusive Territory," to whom PracticeWorks or SoftDent has either directed one or more communications offering the SoftDent software and related products for direct sale, or has sold SoftDent software and related products; and identify all documents related thereto and all persons with knowledge thereof.

13. Identify each person who has had any written and/or oral communication with Chuck Dermott, Robert J. Chaisson or Jeff Lyon regarding any allegation set forth in this matter after April 8, 2002; and identify all documents related thereto and all persons with knowledge thereof.

14. Since January 1, 1993, identify any and all individuals having knowledge of issues pertaining to the distribution of SoftDent software upgrades, pricing, and participation in trade shows, and identify all documents related thereto.

15. Since January 1, 1993, identify any and all individuals having knowledge of SoftDent products and services which were offered for sale in geographical territories other than the "Exclusive Territory" defined by the Agreement and which Plaintiffs did not permit DMA to offer for sale in its "Exclusive Territory", and identify all documents related thereto.

16. Please indicate under what circumstance, if any, Al Fiore has authority, whether real, implied or apparent, to act on behalf of each of the Plaintiffs; and identify all documents referring or relating thereto and all persons with knowledge thereof.

17. With respect to each person who Plaintiffs expect to call as an expert witness at the trial of this action, identify the person, state the subject matter on which the person is expected to testify, describe the person's qualifications (including but not limited to, the persons educational background, employment history, and publications), identify the cases in, which the person has given prior testimony, state the substances of the facts and opinions as to which the person is expected to testify, and provide a summary of all bases of each opinion and a list of materials considered in reaching each opinion.

18. Please describe in detail Plaintiffs' SoftDent's "Platinum", "Advantage", "SoftDent Lights", and "Subscription" products, related products and services; and identify all documents referring or relating thereto and all persons with knowledge thereof.

19. Please describe in detail all instances in which Plaintiffs have i) offered to sell Software and related products to customers within DMA's "Exclusive Territory"; ii) sold Software and related products to customers within DMA's "Exclusive Territory"; iii)

directly advertised its SoftDent Software and related products and services to customers and potential customers within DMA's "Exclusive Territory"; iv) provided mailing lists, demographic studies, brochures, demonstration disks and other sales materials to DMA, as provided in paragraph 4.4 of the Agreement; and v) provided regular reports as required in paragraph 4.1 of the Agreement; and identify all documents referring or relating thereto and all persons with knowledge thereof.

20. Please describe in detail all instances in which Plaintiffs have forwarded sales "leads" within DMA's "Exclusive Territory" to DMA, including an identification of the potential customer; and identify all documents referring or relating thereto and all persons with knowledge thereof.

21. Please describe in detail and identify any and all inquiries received from customers or prospective customers regarding SoftDent software or related products, including but not limited to: the identity of the customer or prospective customer; ii) any and all contact information for the customer or prospective customer; and iii) the identity of the software or related products.

22. For each software product owned, developed, sold, licensed or distributed by Plaintiffs since January 1, 1993, please identify: the name or title of the software; the name of the author; the date of creation; whether it was a work made for hire; and the date of first publication; and identify all documents referring or relating thereto and all persons with knowledge thereof.

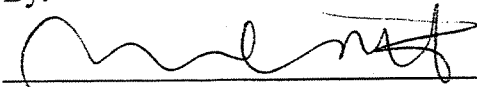
23. For each of the foregoing Interrogatories, identify the individuals who are most knowledgeable with respect to the subject matter of the Interrogatory, including, but not limited to, the individuals who prepared or assisted in the preparation of the response

to the Interrogatory or a portion thereof, and the individuals who were consulted in connection with providing a response to the Interrogatory.

DENTAL MEDICAL AUTOMATION, INC.

Dated: August 30, 2002

By:


One of Their Attorneys

Lead Counsel (Pro Hac Vice):

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Local Counsel:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 th day of August, 2002, a copy of
the foregoing was mailed, First Class postage pre-paid to:

S. Scott Morrison, Esq.
Katten, Muchin, Zavis, Rosenman
1025 Thomas Jefferson Street, N.W.
East Lobby, Suite 700
Washington, DC 20007-5201

and to:

Howard E. Cotton, Esq.
Michael S. Gordon, Esq.
Katten, Muchin, Zavis, Rosenman
575 Madison Avenue
New York, NY 10022

Attorneys for Plaintiffs


Mark E. Wiemelt

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

PRACTICEWORKS, INC.
SOFTDENT, LLC

CIVIL CASE NO.
JFM-02-1206

V.

DENTAL MEDICAL AUTOMATION, INC.
DEFENDANT

/

Friday, February 21, 2003
Baltimore, Maryland
(Conference Call)

Before: Honorable J. Frederick Motz, Judge

Appearances: (By Telephone)

On Behalf of the Plaintiffs:
Michael S. Gordon, Esquire
Howard E. Cotton, Esquire

On Behalf of the Defendant:
John M. G. Murphy, Esquire
Mark E. Wiemelt, Esquire

Reported by:
Mary M. Zajac, RPR
Room 3515, U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

1 (Conference call at 8:30 a.m.)

2 THE COURT: I have a court reporter here who obviously
3 can't see you all. So if I could ask you to identify yourselves
4 for the record and then try to remember to say who you are each
5 time you speak.

6 MR. COTTON: Well, this is Howard Cotton. I'm a
7 member of the law firm of Katten, Muchin, Zavis and Rosenman in
8 New York City. And with me is Michael Gordon, also from the
9 same law firm.

10 MR. WIEMELT: Good morning, Your Honor. Mark Wiemelt
11 on behalf of the defendants.

12 THE COURT: All right.

13 MR. MURPHY: And Your Honor, this is John Murphy, Ober
14 Kaler, on behalf of the defendants as well.

15 THE COURT: Let me start because I'm not sure it was
16 referred to before the reply memorandum was filed, and that is
17 the statement made by the plaintiff on Page 30 of their summary
18 judgment motion in which they seem to indicate that they were
19 not asking that as for existing customers its services no longer
20 be provided, could no longer be provided.

21 MR. GORDON: Your Honor, this is Michael Gordon. Are
22 you referring to reply papers on the motion for reconsideration?

23 THE COURT: Yes.

24 MR. GORDON: We haven't received those papers.

25 THE COURT: That's unfortunate.

1 MR. MURPHY: I mailed them out, I guess, Wednesday.

2 THE COURT: This is Wiemelt.

3 MR. MURPHY: Yeah, this is John Murphy.

4 THE COURT: Mr. Murphy.

5 MR. GORDON: Yes. This has happened before where they
6 sent these papers by regular mail. And we're in New York City,
7 they're mailing it from Baltimore, because of the inclement
8 weather we have not received their reply papers, neither by fax,
9 by hard copy or anything.

10 THE COURT: Well --

11 MR. MURPHY: Must be the weather, Your Honor. I put
12 it in the mail Wednesday afternoon as soon as I got in the
13 office.

14 MR. GORDON: We, as a matter of course, we had Federal
15 Expressed our papers to Mr. Wiemelt and Murphy.

16 THE COURT: You know, this is all very interesting. I
17 asked you to identify yourselves. I know this is the gentleman
18 from New York speaking. Would you please identify yourself?

19 MR. GORDON: Mr. Gordon from New York.

20 THE COURT: Mr. Gordon. Has been Mr. Murphy speaking
21 on the other end.

22 MR. MURPHY: Yes, that was me.

23 THE COURT: Obviously, in this day and age, sending
24 stuff out by mail is stupid. But fortunately, as of two weeks
25 from now it will all be academic because we'll be doing

1 electronic case filing.

2 MR. GORDON: Your Honor, this is Michael Gordon. I
3 think what you're referring to is in the reply. I'm going out
4 on a limb here trying to intuit what you're referring to. But
5 I'm assuming that in their reply papers, they've made reference
6 to a statement made in our brief with respect to the right to
7 provide support and service.

8 And what we said in our brief, in our moving brief,
9 was that because the rights to provide support and service were
10 inextricably intertwined with the materials that we have given
11 them, that it was inconceivable that they would be able to
12 continue providing technical support and service because as Your
13 Honor recognized in the decision on Page Nine, they are required
14 to immediately return all materials to us. You know, sample
15 software, documentation.

16 And so it is impossible for them to continue providing
17 technical support and service to the extent that they're holding
18 on to these materials.

19 If they return the materials, I don't know how they're
20 going to go about doing that. But that was the point that we
21 made in our moving brief last August, if that's what is being
22 referred to.

23 THE COURT: Well, maybe that will help clarify the
24 issue. Is what's being, I'm being ask to reconsider in part is
25 simply whether the technical services can be provided, provided

1 all relevant materials were returned?

2 MR. WIEMELT: Judge, this is Mark Wiemelt. I don't
3 believe there's any factual basis in the record to make the
4 conclusion that the defendants can return all the materials and
5 not provide technical support and service. It's clearly the
6 defendant's position that they can do that just as anyone who is
7 not a party to the agreements can provide technical support and
8 service to the plaintiffs' software.

9 THE COURT: Is all that you're asking is for the right
10 to continue to provide technical services after having returned
11 all relevant materials?

12 MR. WIEMELT: That's correct, Your Honor. Mark
13 Wiemelt.

14 MR. GORDON: Your Honor, this is Michael Gordon. I
15 want to point out that defendants specifically sought a
16 declaration from the Court regarding their continuing right to
17 support, to provide support and service, which is derived from
18 their exclusive right as distributor and value added resaler as
19 granted by the plaintiff in the agreements.

20 They asked the Court to declare that those rights
21 continued. They sought an injunction and to preliminarily
22 enjoin us from providing technical support and service, and the
23 Court declined both of those applications.

24 So they themselves have acknowledged that these rights
25 derived from the agreements. The Court determined that those

1 rights terminated as of December 31st, 2002. They put the issue
2 into play. And the Court ruled unequivocally, unambiguously,
3 and clearly that the rights to provide support and service end
4 on December 31st, 2002.

5 THE COURT: But still, you said in your papers, Page
6 30 of your original memorandum in support, and now I've got to
7 find it, but I think you've just reiterated it here.

8 "Plaintiffs did not dispute the defendants may continue to
9 provide 'technical support' and 'service' to their former and
10 existing customers even after the agreements have been
11 terminated."

12 Now, my understanding is that you've reiterated that
13 today. Your position is that they can't provide that unless
14 they have the technical materials that they have to return.

15 MR. GORDON: Which they still, might I add, have not
16 returned. And our position was we didn't see how they would be
17 able to continue providing said support and services without
18 having those materials. As I said, they are just inextricably
19 intertwined.

20 THE COURT: That's a different question. If all I am
21 being asked is to clarify my opinion to say that they can
22 continue to provide technical support and service as long as
23 they return all relevant materials, then it seems to me that
24 there's no disagreement.

25 MR. GORDON: Well, I guess the question I have is what

1 was the purpose of them seeking a declaration as to their
2 continuing right if they thought, like anybody else in the
3 public, that they had a right to continue doing so? I don't
4 understand why they, why they interposed a counterclaim directed
5 to this right if indeed they thought this right continued. I
6 mean, the Court determined that it doesn't continue.

7 THE COURT: Well, I'm not sure I understand that,
8 either, why they asserted the counterclaim and then, and then --

9 MR. GORDON: The agreement, Your Honor. I mean, there
10 are judicial admissions all over their counterclaim. You know,
11 this is an agreement for the provision of services. This is a,
12 these rights derive from the agreement as cited in said
13 Paragraphs 12 and 105 in their third counterclaim.

14 They're asking to permanently and preliminarily enjoin
15 us, plaintiffs, from directly offering support and service to
16 their customers. If they thought that, quote, "like any other
17 members of the public" their right to provide support and
18 service was outside the contract, then I can't imagine why they
19 would have requested that kind of relief from the Court. It
20 just doesn't make sense. And the Court has ruled on this issue
21 very clearly. And it's our position that those rights have
22 ended.

23 THE COURT: Well, I'll hear from Mr. Wiemelt. I guess
24 the answer is, in light of my ruling or maybe people can make
25 mistakes when they file counterclaims.

1 MR. GORDON: By the way --

2 THE COURT: Wait a minute. I want to hear from Mr.
3 Wiemelt. I know it's difficult over the telephone. But I just
4 said I wanted to hear from Mr. Wiemelt and I was speaking.

5 MR. GORDON: Sorry, Your Honor.

6 THE COURT: Now, Mr. Wiemelt, my understanding is that
7 if for whatever reason you filed the counterclaim, then you
8 didn't oppose it on summary judgment. Your position is now, may
9 have been then, that you had rights derived from the agreement,
10 presumably unspoken, you also had rights derived from common
11 law.

12 Now, I have ruled against you on the agreement after
13 you didn't oppose it and I probably, you didn't oppose it and I
14 ruled against you. Now you're saying, well, all I want is a
15 clarification that all you ruled was on our counterclaim which
16 says, you know, that no rights from the agreement, that provided
17 that we return all the materials, we still have a right under
18 the law, as any other member of the public, to provide technical
19 support and service.

20 MR. WIEMELT: Mark Wiemelt, Your Honor. That's
21 correct. And I note that in plaintiff's motion for summary
22 judgment on Page 30, they continue by stating, quote, "hence
23 defendants may continue to provide technical support and service
24 insofar as these activities do not involve the use of materials
25 which defendants otherwise are obligated to return to

1 plaintiffs."

2 In light of those two admissions in their, in their
3 motion for summary judgment, we saw no reason to contest that
4 and didn't file a response because we, they agreed that we could
5 provide technical support and service after the agreements were
6 terminated. So we conceded the point that we could not provide
7 updates, upgrades, and other electronic services under the
8 agreement, but we thought we would retain our common law rights
9 to provide technical support and service, especially because the
10 plaintiffs agreed with us on that point.

11 THE COURT: And on this issue, that's all you're
12 asking clarification on?

13 MR. WIEMELT: That is correct.

14 THE COURT: All right. Mr. Gordon.

15 MR. GORDON: Yeah. As I previously said, we agreed
16 with them to the extent that they returned all materials to us.
17 Our understanding, that they are continuing to use our software
18 and our documentation to provide that support.

19 And again, we don't see how they're going to be able
20 to provide support. And we, in fact, believe that they will
21 compromise the integrity of the product if they purport to
22 provide support without the materials that they are supposed to
23 return to us.

24 Again, I don't understand why the technical support
25 issue was lumped into the counterclaim. We feel the Court's

1 decision was clear and unambiguous and should stick.

2 THE COURT: Mr. Wiemelt, what about the fact that, how
3 can you provide, are you returning all the materials? Have you
4 returned them? Are you using them? What's the story on that?

5 MR. WIEMELT: Mark Wiemelt, Your Honor. We're
6 prepared, you know, upon resolution of the issues in this case,
7 there are some counterclaims pending. And I guess we'd have to
8 resolve what to do with the material to the extent that it's
9 relevant to our counterclaims. But we're prepared to return
10 those materials once those issues are decided and we can
11 continue to provide support and service without the materials.

12 It's important to note that the materials relate, were
13 advertising collateral used to sell the product. It's not
14 necessary for my clients to use that material to provide
15 technical support and service for the products.

16 Now, I want to make it clear. They will use software
17 but they're using only software that they have, that they have
18 lawfully purchased and for which title has passed to them. And
19 there's no question that any member of the public can either use
20 software they purchased from the plaintiff to provide technical
21 support and service or the defendants can simply use the
22 software that their customers have purchased from plaintiffs to
23 provide technical support and service.

24 So to say it's a virtual impossibility for the
25 defendants to provide technical support and service after

1 returning the materials related to the product is inaccurate.

2 MR. GORDON: Your Honor, Michael Gordon. Implicit in
3 what Mr. Wiemelt just said, he's using our software. And he has
4 judicially admitted that his rights to sell, support and service
5 derive from the agreement. The agreements have terminated.

6 And again, it's our position, based on the plain
7 language of the agreements and on the Court's determination with
8 respect to the counterclaim, that all of these rights have come
9 to an end.

10 THE COURT: Okay. I'm prepared to rule on this. The
11 motion for clarification is granted on this limited issue. All
12 I intended to do was to address the rights under the agreement.
13 That's what I was focused upon.

14 In light of what the plaintiffs had said, frankly, I'm
15 not even sure I had focused upon this, but the plaintiffs
16 themselves made it clear in their memorandum in support that
17 they were not disputing "the defendants may continue to provide
18 technical support and service to their former and existing
19 customers even after the agreements have been terminated",
20 provided, and that's the end of the quote, but provided, of
21 course, protected, that relevant materials were returned and not
22 used.

23 That's all I'm holding today is that that, my holding
24 was limited to that; to the extent that there was an independent
25 right on the part of the defendants to provide technical support

1 and service just like any other member of the public, I did not
2 mean to address that. And so to that extent, my opinion is
3 clarified because that's all I was addressing.

4 Now, if there are issues that materials are being
5 improperly used, that's a whole different question. And if the
6 plaintiffs want to move for an injunction, if their position is,
7 well, materials are being used improperly, that they should be
8 returned or that software is being used improperly, that is a
9 whole different legal issue. And I am perfectly willing to
10 entertain that in the proper context. But this isn't the
11 context.

12 The opinion was limited to the counterclaim. Why the
13 counterclaim was asserted, you know, that's curious, but maybe
14 not. I don't want to reanalyze that.

15 The fact of the matter is all I was addressing was
16 what was before me, and that was whether or not the agreement
17 provided a -- I've held what I held and I was not intending to
18 address any independent right that the defendants may have had
19 because the plaintiffs didn't put that before me. They said in
20 their motion that they did not dispute that the defendants could
21 continue to provide technical support and service, provided that
22 they didn't improperly use plaintiffs' materials.

23 So on these other issues, I mean, I'm here.

24 MR. GORDON: This is Michael Gordon. Now, you had
25 raised the possibility of us filing an application for

1 injunctive relief but we do not want to burden the Court with
2 additional paper. Your decision said, on Page Nine, defendants
3 are required to immediately return to plaintiffs any and all
4 materials regarding the products in any form whatsoever.

5 We would be moving for an application or an order
6 directly requiring them to do that at the risk of contempt. If
7 they are willing to do that, then we don't need to make an
8 application for injunctive relief.

9 THE COURT: Mr. Wiemelt?

10 MR. WIEMELT: Yeah, Judge, Mark Wiemelt. We're
11 willing to return the materials and not use them to provide
12 technical support and service. Again, the one issue we have is
13 many of these materials are relevant to our counterclaims. So,
14 you know, I guess we would be willing not to use them but to
15 return them would then be returning the evidence of some of our
16 counterclaims.

17 THE COURT: Maybe you and Mr. Gordon can work that
18 out. Maybe, maybe they should be held by you as counsel if you
19 need them and not by your client, in case there's concern that,
20 in fact, they're being used to provide services. Would that be
21 an avenue of a possible resolution of that issue?

22 MR. GORDON: Yeah. As long as all copies as well are
23 maintained by Mr. Wiemelt.

24 MR. WIEMELT: Mark Wiemelt. Yeah. That's acceptable,
25 Judge. And I guess we'll try to work it out. But I would ask

1 that they try to more clearly identify which issues they think
2 are subject to return.

3 MR. GORDON: Everything. The agreement says "any and
4 all materials regarding the product." Extremely broad language.
5 Everything you've ever received. Everything your clients have
6 ever received.

7 MR. WIEMELT: Mark Wiemelt again. I think in theory,
8 and probably in practice, it's possible to do that. We talked
9 before. It's hypothetically possible to burn down the building
10 and walk across the street with a lunch pail and still provide
11 technical support and service.

12 I think I can check with my clients and see if they
13 can't drop all the materials that have ever been given them by
14 the plaintiffs, with the exception of the software that they've
15 purchased, drop all that material off to my office pending this
16 litigation.

17 THE COURT: Okay.

18 MR. GORDON: Okay.

19 THE COURT: Good. That seems to resolve it.

20 As far as the other issues are concerned, they were
21 closely, they're close legal issues now, they were close legal
22 issues then in terms of, I don't know how close they were. But
23 they're difficult legal issues in terms of the reasonable notice
24 and in terms of the extrinsic evidence. They're issues that I
25 thoroughly considered. And to the extent that I'm asked to

1 reconsider them, I deny that motion. Okay?

2 MR. GORDON: Thank you, Your Honor.

3 THE COURT: Thank you all very much. I'm sorry I was
4 sharp with you, Mr. Gordon. I know it's very tough on these
5 telephones when you don't see one another. There's delay in
6 transmissions. Thank you. Anything else?

7 MR. GORDON: No.

8 THE COURT: Are we otherwise on schedule?

9 MR. COTTON: Judge, this is Mr. Cotton. I wanted to
10 raise an issue with respect to the orders issue regarding
11 attorney's fees.

12 What we're still trying to do and hopefully we'll be
13 able to do this without further engaging the Court is work that
14 issue out.

15 THE COURT: By the way, I've told Mary, unless you all
16 want this, this doesn't have to be on the record, does it?

17 MR. COTTON: That's entirely up to you.

18 (Off record discussion.)

19 (Conclusion of Proceedings.)
20
21
22
23
24
25

REPORTER'S CERTIFICATE

I, Mary M. Zajac, do hereby certify that I recorded stenographically the proceedings in the matter of PracticeWorks, Inc. Versus Dental Medical Automation, Inc., Case Number(s) JFM-02-1206, on February 21, 2003.

I further certify that the foregoing pages constitute the official transcript of proceedings as transcribed by me to the within matter in a complete and accurate manner.

In Witness Whereof, I have hereunto affixed my signature this 14th day of March, 2003.

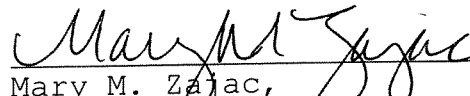

Mary M. Zajac,
Official Court Reporter

EXHIBIT E

*IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND*

PRACTICEWORKS, INC., et al)	
)	Civil Action No.
Plaintiffs/Counter-Defendants,)	JFM02CV1205
)	
v.)	
)	
PROFESSIONAL SOFTWARE SOLUTIONS OF)	
ILLINOIS, INC.,)	
)	
Defendant/Counter-Plaintiff.)	DEMAND FOR JURY TRIAL

**MEMORANDUM IN SUPPORT OF PSSI'S MOTION TO CLARIFY,
RECONSIDER, ALTER OR AMEND MEMORANDUM AND/OR ORDER**

NOW COMES the Defendant/Counter-Plaintiff Professional Software Solutions of Illinois, Inc., (hereinafter "PSSI"), by and through its attorney, John M.G. Murphy, of Ober, Kaler, Grimes & Shriver, and Mark E. Wiemelt, of the Law Offices of Mark E. Wiemelt, P.C., and submits this Memorandum in Support of PSSI's Motion to Clarify, Reconsider, Alter and/or Amend the Memorandum dated January 7, 2003 and/or the Order dated January 7, 2003 under Fed.R.Civ.P. 52(b), 59(e) and 60(b).

PSSI respectfully requests this Court to clarify whether its Memorandum dated January 7, 2003 and Order dated January 7, 2003 properly enjoins and/or prevents PSSI from providing post-termination technical support and services.

In addition, PSSI respectfully requests this Court to reconsider its Order and Memorandum with respect to the following issues: (1) assuming the Agreement is terminable upon reasonable notice, whether a genuine issue of material fact exists as to

whether Plaintiffs provided reasonable notice of termination to PSSI; (2) whether the Agreement's termination provisions are ambiguous; and (3) whether refusing to consider PSSI's evidence of admissions by Plaintiffs' representatives and their predecessors' representatives subsequent to execution of the Agreement was proper.

PSSI also respectfully requests this Court to amend or alter its Memorandum dated January 7, 2003 and its Order dated January 7, 2003 to more particularly specify the terms of the judgment and to reflect the Court's findings with respect to clarification and reconsideration, as appropriate.

I. BECAUSE PLAINTIFFS' COUNSEL IS MISINTERPRETING AND MISCONSTRUING THE MEANING AND EFFECT OF THE COURT'S GRANTING OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO COUNTERCLAIM 8 AND THE COURT'S STATEMENTS IN ITS MEMORANDUM REGARDING SAME, CLARIFICATION IS REQUESTED.

In denying PSSI's Counterclaim 8, the Court stated in its Memorandum that PSSI is "not entitled to continue technical support and services anticipated by the Agreement[s]." (Memo. p. 9). For purposes of this Motion to Clarify, PSSI does not contest the Court's granting of Partial Summary Judgment in favor of Plaintiffs on Counterclaim 8. However, Plaintiffs misinterpret and misconstrue the Court's Memorandum and Order as enjoining or preventing PSSI from providing post-termination technical support and services. PSSI does not believe the Court's Memorandum or Order was intended to or properly enjoins or prevents PSSI from providing post-termination technical support or services. The confusion over the Court's Order and Memorandum has precipitated unnecessary disputes between the parties and requires clarification since PSSI has entered into long-term agreements for the provision of technical support and services. (See, Affidavit of Wiemelt, Exh. A). Therefore, PSSI requests the Court to clarify the meaning and effect of its

Memorandum and Order regarding PSSI's rights to provide post-termination technical support and services. *See Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*, 904, 907 F.Supp. 644 (N.D. Ohio 1995) (modifying court's opinion to resolve ambiguity and the fear of "the possibility of confusion over the Court's language").

PSSI's Counterclaim 8 requested "a declaratory judgment pursuant to 28 U.S.C. § 2201 that its rights to provide support, service, updates, upgrades and electronic services derived from its exclusive rights as a distributor and value added reseller as granted by Counter-Defendants in the Agreement cannot be terminated by the letter of April 8, 2002." PSSI did not oppose Plaintiffs' Motion for Partial Summary Judgment on Counterclaim 8 because PSSI's rights to provide technical support and service do not derive from and were not granted by the Agreement. However, nothing within the Agreement or the law prevents PSSI from providing such support and service post-termination, as Plaintiffs now suggest.

Even if not amended or reversed, the Court's entry of partial summary judgment denying PSSI's Counterclaim 8 does not equate to an injunction or a judgment that PSSI cannot provide support or service separate and apart from any rights granted by the Agreement. While the Court properly noted that "[Defendants] point to no language in the Agreements, and there is none, that allows them to continue to sell updates, upgrades, and provide certain electronic services following termination of the Agreements," PSSI disputes the implication that some terms within the Agreement are required before PSSI can provide post-termination technical support and services, as opposed to updates, upgrades and certain electronic services.¹ (Memo. p. 9). Again, PSSI's rights to provide

¹ PSSI does not contest that its rights to provide Products, including updates, upgrades and certain electronic services derive from the Agreement and terminate upon proper termination of the Agreement.

technical support and services do not derive from the exclusive rights granted in the Agreement. Even if all of the rights granted by the Agreement were properly terminated, and regardless of whether PSSI is required to “immediately return to [the plaintiffs] any and all materials regarding the Products in any form whatsoever”, PSSI’s rights which are independent of the Agreement survive termination. Like any other member of the public, PSSI is entitled to provide technical support and service for Plaintiffs’ products, absent unfair competition or other unlawful conduct.

Again, nothing within the Agreement prevents PSSI from providing technical support and service post-termination. While the Agreement contains a covenant not to compete, it is inapplicable by its own terms because it references only the sale of software and because PSSI was not terminated for Default. The covenant not to compete reads in part:

After termination of the Dealer by PSS for Default. . . Dealer shall not engage in the business of selling dental or medical software products

(Pl.’s Ex. B and C, Agreements ¶12.1).

This clause does not reference post-termination technical support and services. Since post-termination technical support and services are not governed by the Agreement and PSSI was not terminated for Default, the common law should govern PSSI’s right to compete and to provide technical support and services.

Plaintiffs attempt to misconstrue and misinterpret the Court’s Order as granting injunctive relief. Initially, PSSI notes that Plaintiffs never sought injunctive relief regarding post-termination technical support and service in either their Complaint or their Motion for Partial Summary Judgment. Instead, Plaintiffs argue that the Court’s granting

of partial summary judgment denying PSSI's request for a declaration under the terms of the Agreement equates to an injunction against conduct which is not governed by the Agreement. Plaintiffs' argument that the Court entered an enforceable injunction preventing PSSI from providing technical support or service post-termination lacks factual or legal support.

The Court presumably did not intend to enjoin any conduct of PSSI as the Court's Order does not provide with specificity the terms of an enforceable injunction under Fed. R. Civ. P. 65(d).

[W]hile an injunction regarding the Act need not be laboriously detailed, it must say something about the conduct enjoined. Moreover, to the extent that the district judge's order reflects an intent to enjoin [defendant] from future conduct, it does so only by reference to the complaint, a practice obviously prohibited by the rule. If this was to [sic] an injunction, it does not remotely conform to the dictates of Rule 65(d).

Reich v. ABC/York-Estes Corp., 64 F.2d 316, 319-20 (7th Cir. 1995) (citation omitted).

Consequently, "[t]he failure to comply with Rule 65(d) renders the order issued by the district court not an injunction and places [defendant] under no obligations." *Id.* In the instant case, the Court apparently included no Rule 65(d) language in the Order because it did not intend to enjoin any conduct of PSSI.² Therefore, PSSI is under no obligation not to provide technical support and service post-termination of the Agreement.

In a further effort to misconstrue the Court's judgment, Plaintiffs attempt to mischaracterize a portion of the Court's Memorandum as an enforceable part of the Court's Order. Plaintiffs argue that language within the Memorandum which references the Order somehow incorporates the terms of the Memorandum into the Order. Plaintiffs' incorporation by reference argument also lacks factual or legal support.

² As evidence that the Court did not intend to enjoin PSSI, PSSI notes that no injunction bond hearing was held.

Initially, in order for the terms of the Memorandum to be incorporated into the terms of the Order, the Order should reference the Memorandum, not vice versa. Moreover, incorporation by reference is impermissible under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 58 provides that "Every judgment shall be set forth on a separate document." "Under Fed. R. Civ. P. 58 the judgment must be self-contained and complete. . . . It must describe the relief to which the prevailing party is entitled and not simply record that a motion has been granted." *American Interinsurance Exchange v. Casualty Company of North Carolina*, 835 F.2d 157, 159 (7th Cir. 1987) (citations omitted). The Order and not merely the Memorandum must contain the relief granted. *See Azeez v. Fairman*, 795 F.2d 1296, 1297 (7th Cir. 1986) (District Court Judge stated in his opinion that he would enter a declaratory judgment, but the actual judgment granted only monetary relief). "An opinion is not a substitute for a judgment, for the judgment must be self-contained." *Horn v. Thurmond*, 898 F. 2d 589, 591 (7th Cir. 1990). "The meaning of a judgment depends on what it says rather than on what is in the complaint or what the parties (or judges) intended." *Citizens Electric Corporation v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1021 (7th Cir. 1995) (citation omitted) (noting that the Supreme Court adopted a four-corners rule for consent judgments). "An opinion explains the reasons for entering a judgment but is not itself a source of legal obligations." *Horn*, 898 F. 2d at 591. Therefore, the Order and not the Memorandum provides the terms of the judgment against PSSI, and the Order does not provide that PSSI is enjoined from doing any act, including providing technical support or service post-termination of the Agreement.

Finally, it was unnecessary for the Court to determine whether PSSI could provide

post-termination technical support and services independent of the Agreement. PSSI asked the Court to declare the rights under the Agreement. Plaintiffs sought only a denial of PSSI's request for a declaration of rights under the Agreement. Presumably, that is why the Court qualified its statement that PSSI is "not entitled to continue technical support and services" by adding the phrase "anticipated by the Agreement[s]." (Memo. p.9). Because it was unnecessary for the Court to determine whether PSSI could provide post-termination technical support and services independent of the Agreement, PSSI seeks a clarification that neither the Court's Memorandum nor its Order enjoins or prevents PSSI from providing post-termination technical support and services. Alternatively, PSSI respectfully requests this Court to amend or alter its Order dated January 7, 2003 and Memorandum dated January 7, 2003 to clarify that nothing in the Court's Order or Memorandum shall be construed to enjoin or prevent PSSI from providing post-termination technical support and services.

II. THE COURT'S RULING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER PLAINTIFFS PROVIDED REASONABLE NOTICE OF TERMINATION SHOULD BE RECONSIDERED.

Even assuming that the Agreement could be terminated upon reasonable notice, the Court erred by granting partial summary judgment that Plaintiffs provided reasonable notice of termination of the Agreement because PSSI presented sufficient evidence to at least create a genuine issue of material fact as to whether the notice of termination was reasonable. More particularly, the Court erred in failing to consider all of PSSI's evidence regarding reasonableness of the notice and in failing to recognize that Plaintiffs offered only arguments and absolutely no evidence in their favor on the issue. Therefore, the Court should reconsider and amend or alter its Memorandum and Order to provide that a genuine

issue of material fact exists on the issue of whether Plaintiffs provided reasonable notice of termination of the Agreement.

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). A material fact is in dispute when its existence or non-existence could lead a jury to different outcomes. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party. *Id.* The evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in her favor. *Id.* at 255. Mere speculation by the non-moving party cannot create a genuine issue of material fact. *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

The non-moving party offers appropriate Fed. R. Civ. P. 56 (e) affidavits in support of its arguments. (“When a motion for summary judgment is made. . . an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e)). The Rule 56(e) affidavits submitted by PSSI contained more than “mere bald assertions” and were not “speculation,” but rather they contained facts and statements of PSSI which should have been taken as true and all justifiable inferences should have been drawn in favor of PSSI as the non-moving party. *See infra* § II. A.

This Court erred by impermissibly ignoring the non-moving party’s evidence; erred by construing the evidence of record in favor of the moving party; and erred by denying

that an issue of material facts exists. Therefore, this Court should reconsider and reverse its decision that no reasonable jury could find that the notice given by the moving party was unreasonable in light of the circumstances.

A. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER THE NOTICE OF TERMINATION GIVEN IN THIS PARTICULAR CASE WAS REASONABLE

For the court to determine the appropriateness of the reasonableness of notice at the summary judgment stage, the court must consider all the evidence of record and construe that evidence in a light most favorable to the non-moving party, PSSI, to determine if no genuine issue of material fact exists. The Court failed to do so.

First, when determining the reasonableness of notice, the court may consider the nature, purpose and circumstances surrounding the reasonableness of termination. *See e.g. Lerner v. Lerner Corporation*, 132 Md. App. 32, 46, 750 A.2d 709, 716 (Md. Ct. Spec. App. 2000). “In determining what constitutes a reasonable duration, reference should be made to the subject matter of the agreement.” *Id.* “In *Williston*, it states that ‘courts frequently interpret promises requiring continued performance for a reasonable time or until terminated by reasonable notice, **all the circumstances surrounding the transaction must be considered in reaching an appropriate conclusion.**’ *Id.* citing 1 *Williston on Contracts*, § 4:19, at 446-47 (footnotes omitted) (emphasis added).” *Lerner*, 132 at 46, 750 at 716. In attempting to determine the intention of the parties, “the court may consider all relevant circumstances—including circumstances as of the time of entering into the agreement, events thereafter, and considerations of policy and fairness.” *Id.* “In determining the reasonable duration of a contract, reference should always be made to the subject matter of the agreement.” *Goldman, Skeen & Walder, P.A. v. Cooper, Beckman &*

Tuerk, 122 Md.App. 29, 712 A.2d 1 (Md. Ct. Spec. App. 1998). What is a reasonable time depends on the nature, purpose, and circumstances. See *Best Distributing Company, Inc. v. Seyfert Foods, Inc.*, 714 N.E.2d 1196, 1206 (Ind. Ct. App. 1999) (oral agreement) (distributor found substitute); *Monarch Beverage Co., Inc. v. Tyfield Importers, Inc.*, 823 N.E.2d 1187, 1190 (7th Cir. 1987) (oral agreement) (Based on specific testimony of employee of Monarch on cross-examination, the court held that Monarch could have substituted product within the notice period); *Best Way Distributing Company, v. Brown-Forman Corporation*, 873 F.2d 1437, 1989 WL 37395 (4th Cir. 1989) (unpublished) (oral agreement) (uncontested that 90 days was reasonable notice); *Aaron E. Levine and Company, Inc. v. Calkraft Paper Co.*, 429 F.Supp. 1039, 1051 (E.D. Mich. 1976) (Levine re-entered into a distributorship contract with a third party).

Even assuming arguendo that the Agreement is terminable at will upon reasonable notice, the question of reasonableness alone presented a question of fact which could not be decided in this case on Plaintiffs' Motion for Partial Summary Judgment. The only evidence of record was presented by PSSI. The moving party presented no evidence and insisted on filing a Motion for Partial Summary Judgment prior to discovery. Moreover, the facts contained within PSSI's Rule 56(e) affidavits, which were uncontradicted and are to be taken as true and all reasonable inferences be drawn in favor of PSSI, show that a genuine issue of fact exists as to whether Plaintiffs provided reasonable notice of termination.

The Court's Memorandum considered only two statements from which the Court decided there is no genuine issue of fact: the statement by PSSI that nine months is unreasonable; and PSSI's statement that it does not have a substitute agreement. (See

Memorandum, page 8). Many other circumstances surrounding the transaction which were properly made of record by PSSI and which were uncontradicted should have been considered by the Court when deciding the issue of reasonableness of the notice.

The duration of the Agreement is a relevant circumstance surrounding the transaction which was not considered by the Court. PSSI entered into the Agreement in 1993 and remained obligated to the Agreement for more than nine years. (Eyer Aff. ¶ 2). The performance of PSSI under the Agreement is also a relevant circumstance surrounding the transaction which was not considered by the Court. During the term of the Agreement, PSSI met and exceeded the required quota of sales for all years in which it has been a party to the Agreement. (Eyer Aff. ¶ 4). PSSI's purchase quota was in excess of 1068. (Eyer Aff. ¶ 5). The excess purchase quota dictates that PSSI met its purchase quota through the year 2014. Therefore, a reasonable jury could decide that a reasonable notice of termination could extend well into the year 2014.

A reasonable jury could also decide that reasonable notice of termination necessitates more than nine months' notice be given considering PSSI relied on the exclusive rights to distribute the Products and expended significant funds to maximize and develop the economic viability of PSSI in the defined territories. (Eyer Aff. ¶ 11). A reasonable jury could decide that a reasonable notice of termination necessitates more than nine months' notice be given considering PSSI relied on a continuing Agreement and did not pursue other opportunities. (Eyer Aff. ¶ 12). All of these facts are relevant circumstances surrounding the transaction which were not considered by the Court.

Furthermore, circumstances surrounding the transaction which were not considered by the Court include the extrinsic evidence which the Court did not consider for purposes

of interpreting whether the Agreement was ambiguous and terminable upon reasonable notice. Although the Court did not consider the evidence in connection with interpreting the Agreement, the Court should have considered the evidence in considering whether the non-moving party PSSI offered sufficient evidence regarding the issue of reasonableness of the notice to defeat the Motion for Partial Summary Judgment. For example, the Court should have considered the March 25, 1993 faxed communication from Chuck Dermott, who executed the Agreement on behalf of Plaintiffs' predecessor, to John Wegner and Lawrence E. Eyer of PSSI and Jeffrey Suglio of DMA. In the fax, Mr. Dermott addressed the issue of raising the proposed quota (from 25 to 50) and stated that "As long as I have the products, you will, unless you can't meet quotas or start destroying our reputation in your respective territories (highly unlikely)." (Eyer Aff., ¶17, Ex. 1). This statement should be admitted into evidence for the purpose of determining the reasonableness of the notice because it is a circumstance surrounding the transaction. In light of this evidence, a reasonable jury could decide that a reasonable notice of termination would not be nine months.

Likewise, regardless of whether the Agreement is considered ambiguous, the Court improperly excluded extrinsic evidence which was subsequent to the execution of the Agreement and which constitutes admissions, including the following:

Chuck Dermott provided Lawrence E. Eyer of PSSI with a copy of an e-mail dated November 10, 1997 from Chuck Dermott to Frank Jones, counsel for Plaintiffs' predecessor InfoSoft, Inc., in which Mr. Dermott stated in relevant part as follows:

By Way of Background: In 1993, I entered into a **long-term contract** with both Jeffrey Suglio of Dental Medical Automation and John Wegner of PSS of Illinois. This was brought on by various economic decisions that each of these organizations had to make in order to grow their businesses. They

wanted some assurance that they were not going to become the proverbial babies that were thrown out with the bathwater. Since they were among the very few that I was sure were “keepers”, I agreed to enter into a **long-term relationship** that I felt was of mutual benefit to all parties involved (InfoSoft, PSS, and the aforementioned Dealers.) It used our Standard Dealer/Reseller agreement, but extended to them certain **unalienable rights**. (Eyer Aff., ¶18, Ex. 2)(emphasis added).

On December 5, 1997, in connection with attempted re-negotiations of the PSSSI and DMA Agreements, Lawrence E. Eyer received from Jeff Lyon a facsimile communication comprising a copy of correspondence from Frank Jones, counsel for Plaintiff's predecessor InfoSoft, Inc., to Jeff Lyon, of InfoSoft, Inc., stating in relevant part as follows:

5. Quotas. ...Right now the agreement throws the initial quota, the renewal quota and the **termination rights** all together in a jumbled way that is **very unclear in operation**...First, there should be a “look back” provision that addresses how to deal with a **Dealer which has not made quota for a contract year just ended (this obviously has implications regarding our ability to terminate).**

...
...the agreement renews automatically, and our **termination rights are very limited.**

...
given all of the other ground which we have given on contract **termination rights....**

6. Term; Termination Rights. I still don't see why the **contracts continue ad infinitum**; this is *highly* unusual. However, based upon our discussion, I have lightly edited Eyer's language. These changes **retain his automatic renewal feature...**

8. Miscellaneous Provisions

...my incomplete list of “death by a thousand cuts includes:”

...
(h) the inclusion of an automatic renewal in perpetuity;
(emphasis added).

(Eyer Aff., ¶19, Ex. 3)(emphasis added).

In a telephone conversation with Jeffrey Suglio on May 9th, 2002, Chuck Dermott indicated that at the time the DMA and PSSSI Agreements were executed, he intended that

DMA and PSSI would not lose their exclusive rights to distribute Products in their Territories as long as they met the average quota provided in the Agreement. (Suglio Aff., ¶19) In a telephone conversation with Jeffrey Suglio on May 9th, 2002, Chuck Dermott indicated that he informed Al Fiore of Plaintiffs that at the time the DMA and PSSI Agreements were executed, he intended that DMA and PSSI would not lose their exclusive rights to distribute Products in their Territories as long as they met the average quota provided in the Agreement. (Suglio Aff., ¶20). In a telephone conversation on June 12th, 2002, Chuck Dermott indicated that he informed Plaintiffs' lawyers that at the time the DMA and PSSI Agreements were executed, he intended that DMA and PSSI would not lose their exclusive rights to distribute Products in their Territories as long as they met the average quota provided in the Agreement. (Suglio Aff., ¶21). During numerous conversations since the date of the Agreements, Al Fiore has stated to both Jeffrey Suglio and Lawrence E. Eyer that the Agreements cannot be terminated without cause. (Suglio Aff., ¶23, Eyer Aff., ¶21). Given all of the foregoing uncontradicted evidence of the circumstances surrounding the Agreement, a reasonable jury could decide that a reasonable notice of termination would not be nine months.

Furthermore, the Court did not consider other uncontradicted evidence of the circumstances surrounding the Agreement. In negotiating and entering into the Agreement, PSSI contemplated a continuing business relationship. (Eyer Aff., ¶6). PSSI negotiated and put forth the effort to define six particular circumstances for termination, including a specific right to revoke PSSI's exclusive right as a distributor in the defined Territory if PSSI failed to maintain the specific and determinable purchase quota of fifty Products per year on average. (Eyer Aff. ¶7). The existence of the quota was specifically negotiated by the parties. (Eyer Aff. ¶8). The amount of the quota was specifically negotiated by the parties. (Eyer Aff. ¶9). The use of an average quota versus an annual quota was specifically negotiated by the parties. (Eyer Aff. ¶10). PSSI expended substantial time and money and did not pursue other opportunities during the more than nine year term of the

Agreement, in reliance on the continuing business relationship with Plaintiffs. (Eyer Aff. ¶12). PSSI entered into the Agreement and continued performance with the expectation that its contractual relationship with Plaintiffs would be automatically renewed in accord with the terms of the Agreement, including but not limited to unless and until it failed to meet the quota. (Eyer Aff. ¶15). PSSI substantially complied with all of the material terms and conditions of the Agreement. (Eyer Aff. ¶16). Additionally, Plaintiffs admit that the Agreements “were a renewal of prior dealership agreements between the parties. . . .” (Plaintiffs’ Memo. p.7). Given all of the foregoing uncontradicted evidence of the circumstances surrounding the Agreement, a reasonable jury could decide that a reasonable notice of termination would not be nine months.

PSSI’s Rule 56(e) affidavits present facts, and not merely “bald assertions” or “speculation.” Again, the Court’s Memorandum considers only two statements from which the Court decides there is no genuine issue of fact: (1) the statement by PSSI that nine months is unreasonable; and (2) PSSI’s statement that it does not have a substitute agreement. (See Memorandum, page 8). Standing alone, PSSI’s first statement may be dismissed as a bald assertion. However, the Court must consider all evidence presented within PSSI’s Rule 56(e) affidavits, which, as shown above, shows a genuine issue of fact exists as to whether the notice of termination was reasonable. *See DeGirolamo v. Sanus Corp. Health Systems*, No. 90-2146, 1991 U.S. App. LEXIS 12281, *6 (4th Cir. June 17, 1991) (non-moving party’s affidavit containing statements as to why non-movant believed he was fired created a genuine issue of material fact).

Finally, Plaintiffs offered absolutely no evidence on the issue, and have given up their right to challenge PSSI’s evidence. Plaintiffs are instead trying to punish PSSI for Plaintiffs failure to conduct discovery. Instead, this Court should have taken all the evidence as true, which is solely evidence presented by PSSI, and drawn all reasonable inferences in favor of the non-movant PSSI. Accordingly, a genuine issue of material fact exists as to whether Plaintiffs provided reasonable notice of termination to PSSI.

**B. THE CASES RELIED UPON BY THE PLAINTIFFS AND THE COURT
DO NOT SUPPORT THE COURT'S DECISION**

1. Serpa Corp. and Best Way

The Court should not have relied upon *Serpa Corp.* or *Best Way* for the proposition that shorter time periods in other cases dictate that as a matter of law a longer time period in the instant case is acceptable. In *Serpa Corp.*, the court stated “plaintiff [non-movant] did not present any evidence that a month was insufficient time to secure another supplier, to make adjustments to its operations, or that it provided [non-movant] with an inadequate opportunity to maintain its staff.” *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 14 (1st Cir. 1999). In contrast, PSSI in the instant case has presented plenty of evidence to create a genuine issue as to whether the notice of termination was reasonable. *See Supra* II. A.

In *Best Way*, an unpublished opinion, the issue of whether 90 days was reasonable notice was uncontested. *Best Way Distributing Co. v. Brown-Forman Corp.*, 873 F.2d 1437, 1989 WL 37395 *1 (4th Cir. 1989). The Court is in error when it analogized the instant case which must be decided on its particular facts to the uncontested *Best Way* case.

Serpa and *Best Way* have distinguishable facts and those shorter time periods for notice should not be used to justify the unreasonable notice in the instant case without an examination of the particular facts of this case.

2. Evans and Goldberg

Further, the Court should not have relied upon *Evans* and *Goldberg* for the proposition that PSSI's statements are not evidence of the reasonableness of notice because they are “bald assertions.” (Memorandum, page 8). As noted above, PSSI's evidence consists of far more than the two statements considered by the Court.

In addition, *Evans* and *Goldberg* are both employment discrimination cases where the only evidence in support of the non-movant's position consist mainly of self-serving statements. *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996); *Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988).

In *Evans*, a sex discrimination case, the non-movant offered no evidence of sex discrimination. 80 F.3d at 959. Instead, the non-movant offered allegations of "differential treatment in pay, benefits and seniority but fail[ed] to provide supporting proof." *Id.* The non-movant also offered a statement by her manager deemed "non-discriminatory on its face." *Id.* Finally, non-movant submitted her own affidavit "mostly made up of conclusory statements about her qualifications and the deficiencies of her colleagues." *Id.* The court rejected this evidence as being her "own naked opinion, without more." *Id.*, citing *Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988).

In *Goldberg*, an age discrimination case, the plaintiff also offered no evidence of age discrimination after taking full discovery. 836 F.2d at 848. The only evidence presented was plaintiff's "own naked opinion" of his employer's discriminatory intent and certain circumstantial evidence: the circumstantial evidence consisted of (1) a 3rd party statement that "merely repeats facts" which plaintiff previously alleged; (2) allegations that the employer hired an "unnamed younger employee" and (3) employer's "incredible nature of [its] stated reason for firing [plaintiff]." *Id.* The court rejected this evidence as being insufficient to create a genuine issue of material fact. *Id.*

A common thread found within *Goldberg* and *Evans*, which is absent in the instant case, is that non-movants' opinions of discriminatory intent are unsupported by any evidence to create a genuine issue of material fact. In contrast, the uncontradicted evidence

of record in the instant case presents facts which support PSSI's position that the notice of termination was unreasonable, or at the very least presents a genuine issue of material fact as to whether the moving party provided reasonable notice of termination to the non-moving party.

A case that the Court should have considered is *DeGirolamo v. Sanus Corp. Health Systems*, No. 90-2146, 1991 U.S. App. LEXIS 12281, *6-7 (4th Cir. June 17, 1991). The Court in *DeGirolamo* found that reasonable inferences could be drawn from the "totality of the evidence" including statements within non-movant's Rule 56(e) affidavit, such that it would be improper to resolve the issue of abusive discharge on summary judgment. The statements within non-movant's Rule 56(e) affidavit consisted of information non-movant learned regarding the employer's activities, that he told the employer that he would not engage in such activity, that the employer did engage in activity meant to deceive a 3rd party, and that his on the job performance was acceptable and he improved the financial performance of the employer. *Id.* at *6-7. The court determined that reasonable inferences could be drawn from non-movant's affidavit that would make resolution of the issue on summary judgment improper, even though the court stated that "the question is a close one" and the non-movant's evidence was "thin." *Id.* at *6-7. While the Court may reconsider and declare PSSI's uncontradicted evidence thin, it is more than sufficient to defeat the Motion for Partial Summary Judgment when compared to Plaintiffs' total lack of evidence.

Similar to *DeGirolamo*, in the instant case, the Court should consider the totality of PSSI's evidence of record. As demonstrated above, the uncontradicted statements and facts found within PSSI's Rule 56(e) affidavits taken as true and all reasonable inferences

drawn in favor of the non-movant creates a genuine issue of material fact. Therefore, this Court should reverse its decision of partial summary judgment that the notice of termination was reasonable because a genuine issue of material fact exists.

III. THE COURT ERRED BY FINDING THE AGREEMENT TO BE UNAMBIGUOUS AND NOT CONSIDERING PSSI'S EVIDENCE REGARDING THE AMBIGUOUS TERMINATION LANGUAGE PRESENT IN THE AGREEMENT.

An ambiguity exists on the face of the contract language, and therefore the Court should have examined extrinsic evidence available to interpret the ambiguity.

A written contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning. *Calomiris v. Woods*, 353 Md. 425, 432, 727 A.2d 358, 361 (Md. Ct. App. 1999). "The determination of whether language is susceptible of more than one meaning includes consideration of 'the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution.'" *Id.* at 436, 727 A.2d at 363, citing *Pacific Indem. V. Interstate Fire & Cas.*, 302 Md. 383, 388, 488 A.2d 486, 488 (1985).

The termination provisions within the Agreement are ambiguous on their face because the termination provisions are susceptible of the following meanings: (1) the Agreement provides five (5) grounds for termination; and (2) the Agreement provides six (6) grounds for termination.

The Agreement lists six grounds for termination: the five Default provisions and a quota provision which reads in part:

PSS hereby grants to Dealer the exclusive right to sell the Products in the following Zip Code ranges. . . . Such exclusivity shall continue during the term of this Agreement and all renewals thereof for so long as Dealer's purchases from PSS average twenty (50) programs per year. (Pl.'s Ex. B and C, Agreements ¶ 3.1).

PSS reserves the right to revoke this exclusivity in the event that the Dealer does not maintain the purchase quota outlined hereinabove. (Pl.'s Ex. B and C, Agreements ¶ 3.2).

The ambiguity centers on the whether the quota provision creates a sixth ground for termination.

This interpretation is reasonable considering the primary purpose of entering into the Agreement is so that a Dealer has the exclusive right to sell within its territory. The Agreement states:

PSS acknowledges that Dealer, in executing this Agreement, is relying on the exclusive right to distribute the Products in the Territory. . . . (Pl.'s Ex. B and C, Agreements ¶ 3.1).

A reasonably prudent person could believe that from the face of the Agreement the Dealer entered into the Agreement for the primary purpose of obtaining exclusive rights within its territory. If those exclusive rights are terminated, then Dealer's rights under the Agreement are effectively terminated. It is worth noting that the Agreement does not provide for non-exclusive rights. For example, the Agreement is silent as to the royalties or other consideration to be paid in the event the right to distribute the Products became non-exclusive. Thus a reasonable person could interpret the Agreement's quota provision as a sixth ground for terminating the Agreement.

Based on the face of the Agreement, since the Agreement and its termination provisions are susceptible of multiple meanings regarding grounds for terminating the Agreement, extrinsic evidence should be considered to examine the true meaning of the provisions. The extrinsic evidence demonstrates that the parties intended that the agreement be terminable for only a set of specific circumstances, including the failure to

meet quota, therefore the agreement is not terminable at will. (See Non-movants' Memorandum of Law, section II. pages 21-27). Therefore, PSSI requests this Court to find the Agreement's termination provisions to be ambiguous, and find that the extrinsic evidence supports the interpretation that the Agreement is not terminable at-will.

IV. THE COURT ERRED BY NOT CONSIDERING PSSI'S EVIDENCE REGARDING PLAINTIFF'S ADMISSIONS.

Regardless of whether the Agreement contains an ambiguity, the Court erred in refusing to consider PSSI's evidence of admissions by Plaintiffs' representatives and their predecessors' representatives since the admissions are not prior or contemporaneous extrinsic evidence. This evidence includes the admissions of a lawyer regarding the interpretation of the Agreement's duration and "very limited" termination provisions, admissions that PSSI would not lose their exclusive rights to distribute Products in the Territory as long as it met the average quota provided in the Agreement, admissions that the Agreement cannot be terminated without cause, a written admission that the long-term contract granted bargained for "**unalienable rights**" to PSSI, and admissions by Plaintiffs attempted increase of the quota amount and change of the exclusivity, term and termination provisions of the Agreement. Therefore, the foregoing admissions which were made subsequent to execution of the Agreement should have been considered by the Court and the Agreement should not have been declared terminable upon reasonable notice.

V. CONCLUSION

PSSI respectfully requests this Court to clarify whether its Memorandum dated January 7, 2003 and Order dated January 7, 2003 properly enjoins or prevents PSSI from providing post-termination technical support and services. In addition, PSSI respectfully

requests this Court to reconsider and amend or alter its Memorandum dated January 7, 2003 and Order dated January 7, 2003 to provide that the Agreement's termination provisions are ambiguous and that the Agreement is not terminable upon reasonable notice, or to alternatively provide that a genuine issue of material fact exists as to whether Plaintiffs provided reasonable notice of termination to PSSI.

Respectfully submitted,

PROFESSIONAL SOFTWARE
SOLUTIONS OF ILLINOIS, INC.

By: 

One of Its Attorneys

Dated: 1-21, 2003

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2003, a copy of a Memorandum in Support of PSSI's Motion to Clarify, Reconsider, Alter or Amend Memorandum and/or Order was mailed, First Class postage pre-paid to:

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